

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

February 9, 2010

The Rhode Island Ethics Commission held its 3rd meeting of 2010 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, February 9, 2010, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**Barbara R. Binder, Chair Edward A. Magro
Ross Cheit, Vice Chair Deborah M. Cerullo SSND
J. William W. Harsch, Secretary* Mark B. Heffner
James V. Murray John D. Lynch, Jr.**

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Maninci and Gary V. Petrarca.

At 9:03 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on January 12, 2010. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To approve minutes of the Open Session held on January 12, 2010.

ABSTENTION: Deborah M. Cerullo SSND.

The next order of business was a motion to approve minutes of the Open Session held on January 26, 2010. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To approve minutes of the Open Session held on January 26, 2010.

ABSTENTION: Mark B. Heffner.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Jeffrey S. Booker, a former member of the Smithfield Land Trust. Staff Attorney DeVault informed that this matter would be continued due to a scheduling issue.

At 9:05 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on January 12, 2010.

b.) Motion to approve minutes of Executive Session held on January 26, 2010.

**c.) In re: Christopher Willi,
Complaint No. 2009-4.**

**d.) In re: Charles D. Moreau,
Complaint No. 2010-2.**

**e.) In re: Kevin Carter,
Complaint No. 2010-1.**

**f.) In re: Kevin Carter,
Complaint No. 2009-2.**

**g.) In re: Robert D. Hallal,
Complaint No. 1989-42**

h.) Motion to return to Open Session.

The Commission returned to Open Session at 9:23 a.m., with Commissioner Harsch present.*

The next order of business was a motion to seal minutes of the Executive Session held on February 9, 2010. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To seal minutes of the Executive Session held on February 9, 2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on January 12, 2010 by unanimous vote; 2) approved minutes of the Executive Session held on January 26, 2010 by unanimous vote; 3) unanimously voted to enlarge time to complete investigation of In re: Christopher Willi, Complaint No. 2009-4, with one abstention; 4) initially determined that In re: Charles D. Moreau, Complaint No. 2010-2, states facts sufficient to constitute a knowing and willful violation of the Code by unanimous vote; 5) initially determined that In re: Kevin Carter, Complaint No. 2010-1 states facts sufficient to constitute a knowing and willful violation of the Code by unanimous vote; 6) unanimously voted to consolidate In re: Kevin Carter,

Complaint Nos. 2009-2 and 2010-1; and7) received an update on In re: Robert D. Hallal, Complaint No. 1989-42, which is now closed.

The next order of business was a second vote on and/or discussion of proposed General Commission Advisory (GCA) 2009-3: Participation in Union Actions by Public Officials who are Union Members. Chair Binder stated her belief that the Commission should engage in rulemaking with a public hearing on the record. She expressed interest in proposed legislation, discussed at the last meeting, which would further define “business associate.” Commissioner Magro stated that he does not see a need to adopt a regulation because the definition contains all the language needed. He indicated that the proposed GCA seemed to be a consensus on what all of the members were looking to do, so there would not be a need to amend the statute. Chair Binder stated that she would like to put on the record the testimony that the Commission received at the workshop regarding financial commonality of interest and to bring about the change in a formalized way.

Commissioner Lynch noted that from the outset he thought it would be best to change the statute. He pointed out that if the proposed legislation discussed at the last meeting is adopted, it would change the GCA. He suggested that the Commission might wish to see if the legislation passes first. Commissioner Heffner commented that it would be productive to move forward on parallel tracks with the General Assembly, which may be looking to the Commission on this

issue. In response to Commissioner Heffner, Legal Counsel Conley advised that the proposed GCA would provide guidance and act as notice to the public as to the Commission's position on how the Code applies to certain facts. He stated that a second vote on the proposal today would conclude the process. Legal Counsel Conley explained that rulemaking is a different process with notice, public hearing and the receipt of public comment in written and oral format. He noted that a regulation would have the force and effect of law, providing legal and binding authority.

Commissioner Harsch observed that the first time particular facts arise after the adoption of the proposed GCA there would be a challenge. Legal Counsel Conley advised that rulemaking provides a better way than a GCA for the Commission to defend its actions. In response to Commissioner Harsch, Legal Counsel Conley stated that if the Commission believes that this policy shift represents a fundamental change then rulemaking is required. He noted that GCAs are meant to provide guidance on the current statutes and regulations. If the Commission were to conclude that this is a new application of the business associate analysis, he indicated that rulemaking is the better way to proceed from a legal viewpoint.

In response to Commissioner Cerullo, Legal Counsel Conley informed that rulemaking under the APA is a formalized method for creating a record, setting forth the facts upon which the rulemaking is based. He indicated that there is a process for judicial review with

well accepted standards regarding the basis for rulemaking. He noted that if there were a challenge, that process allows the Commission to engage in fact-finding to support its rulemaking and allows for a defense of the Commission's actions. Legal Counsel Conley stated that advisory opinions do not have the value of mandatory precedent and evolve and change over time as different facts develop. He noted that the Commission would not be bound by its prior opinions in the interim before engaging in any rulemaking. In response to Commissioner Cerullo, Legal Counsel Conley affirmed that the public comments received by the Commission as part of the rulemaking process would come into play if there were a challenge.

Commissioner Cheit expressed his understanding that the proposed GCA would not change anything the Commission has done. Commissioner Magro stated that it would put people on notice. Commissioner Cheit stated his belief that the proposal in fact does less than what both those who are for and against it believe that it does. He suggested that it does not change anything the Commission has done, but only codifies it. He expressed appreciation for Commissioner Heffner's comment regarding the proposed legislation and questioned whether the Commission should weigh in on it. Chair Binder stated that the proposed GCA changes the union's relationship with a school committee member. She stated that she would have no qualms with waiting to see if the legislation is adopted.

Commissioner Magro indicated that he is not wedded to either option but it might be more direct and defensible if the Commission were to engage in rulemaking. Commissioner Lynch noted that there has been a lot of work on the proposed GCA and the Commission might want to hold off for a month or two to see what happens at the General Assembly. He suggested that then the Commission could adopt the proposed GCA as it begins the rulemaking process. He commented that if the Commission adopts the proposed GCA a person could argue that it does not apply to their particular facts.

In response to Commissioner Cerullo, Legal Counsel Conley confirmed that, procedurally, the Commission could adopt the proposed GCA and then engage in rulemaking. However, he advised that the idea that the Commission would adopt the GCA and then have a need to engage in rulemaking would undermine its ability to defend the GCA if challenged. In response to Commissioner Lynch, Legal Counsel Conley indicated that it would not weaken the rule because the Commission would engage in fact-finding as part of its process. In response to Commissioner Heffner, Legal Counsel Conley confirmed that the Commission could abandon the process if it found there was a sufficient result from adopting the GCA. Commissioner Heffner expressed his belief that the GCA could benefit from a parallel tract and the Staff could provide the General Assembly with any needed insight or data. He suggested that a symbiotic relationship would be helpful to the best possible outcome.

Commissioner Magro inquired whether there would be any benefit to keeping the proposed GCA alive. Commissioner Cerullo expressed reservation that by not adopting the GCA the Commission undermines any ability to uphold an advisory opinion stating that there is a conflict if a matter comes before it. She stated that she has no problem with rulemaking but does not want to feel bound that the Commission took this particular route if an advisory opinion were to come before the Commission. Chair Binder commented that some scenarios presented in the proposed GCA present a clear conflict to her. She stated that if she were presented with certain facts, she would vote her conscience. She noted that opinions are advisory and people can proceed at their own risk. Commissioner Cheit indicated that the Commission is not bound at all in an advisory process. He stated that he does not believe that the GCA would sustain a complaint, which is why there is a need for rulemaking.

Commissioner Cerullo stated her preference that the Commission either keep the proposed GCA open or adopt it and proceed to rulemaking. Chair Binder indicated that she would not be comfortable adopting it. In response to Commissioner Harsch, Legal Counsel Conley advised that there would be no harm in tabling the proposal without taking the second vote. Upon motion made by Commissioner Harsch and duly seconded by Chair Binder, it was unanimously

VOTED: To table proposed GCA 2009-3.

After discussion, upon motion made by Commissioner Lynch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To direct Staff to start the background work to move forward on a draft regulation.

The next order of business was a Legislative Update. Staff Attorney Gramitt informed that Senate Bill 2051 would amend the definition of business associate to explicitly state that a member of a bargaining unit is a business associate of the bargaining unit. He noted that this is consistent with the Commission's interpretation, but it is stronger than what currently exists because it is express. He further noted that a person subject to the Code would not be considered a business associate of any state or national umbrella organization, which is also consistent with the Commission's interpretation. He indicated that that would have been the change in the proposed GCA.

Staff Attorney Gramitt advised, however, that if the person were an officer or director of, or receiving individual services from, the umbrella organization, a business association would exist. He advised that what constitutes "individual services" is not spelled out, but it presumably would include where a person is represented in a grievance proceeding, the factual scenario that was the impetus for the proposed GCA. He informed that the legislation represents a substantial step toward the increased jurisdiction that the Commission was looking to accomplish through the proposed GCA.

Staff Attorney Gramitt stated that he has spoken with a member of the House of Representatives who is interested in submitting the same legislation on the House side. He informed that generally the Commission does not take a position on legislation, but its support of this bill would make for an interesting dynamic and likely give it the best chance of passage. In response to Commissioner Heffner, Staff Attorney Gramitt stated that he is registered as a governmental lobbyist for the Commission and has done so each year since 2001. Commissioner Heffner stated that at this time he would be reluctant to authorize him to go forward and state a position on the bill. He suggested that the Commission can act as a detailed study commission and, if and when there is a hearing, perhaps direct Staff to put forward the facts as the Commission has found them, regardless of whether or not the Commission takes a position. Chair Binder noted that it is a valid point. She stated that she would like facts on the person not being a business associate of the umbrella organization. She indicated that the Commission heard a lot of testimony at the workshop, but she would want it on the record.

In response to Commissioner Cheit, Staff Attorney Gramitt stated that he has not spoken with anyone in the Senate regarding this legislation. Commissioner Cheit expressed that he would be interested to know the reasoning of the sponsors and what they meant. He suggested that Staff Attorney Gramitt could learn more regarding the bill's intent and what "individual services" means. Commissioner Magro commented that it looks like it may be limiting

language. Commissioner Cheit inquired what would happen if the umbrella organization comes in at some point during collective bargaining. Commissioner Lynch questioned whether you would even know if they came in due to the confidentiality of personnel matters. Commissioner Cheit stated that perhaps the exemption here is too broad. In response to Commissioner Cheit, Staff Attorney DeVault indicated that her July 15th memorandum reviewed how other jurisdictions address the situation. Commissioner Cheit suggested that she take different stabs at it and come back with language for consideration.

In response to Commissioner Cheit, Staff Attorney Gramitt indicated that in the past the Commission's most frequent position on legislation has been that it does not necessarily oppose it but it does not accomplish its goal as drafted. Commissioner Heffner questioned whether it is the Commission's proper role to be endorsing legislation. Commissioner Cheit stated that it should when it directly affects the Commission. Commissioner Heffner noted that weighing in and taking a position are two different things. Staff Attorney Gramitt advised that the General Assembly's responsibility to legislate ethics is concurrent with the Commission, but the Commission has primary responsibility. He indicated that it makes sense to weigh in, particularly where the Commission could adopt a regulation taking a contrary position. Executive Director Willever noted that a few years ago he and Staff Attorney Gramitt testified on proposed legislation relating to the Public/Private Partnership Act

and suggested how it could be better processed through Commission oversight. Commissioner Cheit reiterated his belief that it is appropriate for the Commission to weigh in on legislation directly affecting it.

Staff Attorney Gramitt advised that House Bill 7386, which would not be in the Code of Ethics, would amend provisions relating to state vendors to provide that if they are doing more than \$5,000 worth of business with the state they cannot make political contributions to the person awarding the contract. He informed that Speaker Fox has introduced House Bill 7357, which would put the issue of a constitutional amendment to amend the ethics and speech in debate clauses before the voters. He noted that the legislation was drafted by Common Cause, in consultation with Operation Clean Government and Commission Staff. He indicated that it has been reported that Senator Lenihan will introduce companion legislation.

Staff Attorney Gramitt also informed that the Senate Rules Committee asked Chair Binder to have someone provide information regarding the jurisdictional issues in Irons as they consider whether to implement self-regulation in the Senate. He stated that he will appear to provide the information. Chair Binder inquired if there has been any indication as to whether Senate President Paiva Weed supports the constitutional amendment legislation. Staff Attorney Gramitt replied that there has been no indication of how the Senate leadership feels.

The next order of business was the Director's Report. Executive Director Willever reported that there are ten complaints and five advisory opinions pending. He informed that two formal APRA requests have been granted since the last meeting and there is one Superior Court appeal pending. He stated that the Staff is preparing for the upcoming financial disclosure season. Based on past experience, he anticipated that there would be an increase in both APRA requests and potential complaints during the upcoming election season. Director Willever advised that the five proposed regulatory amendments were forwarded to the Governor and the Small Business Advocate, and no impact on small businesses was found. He stated that the Commission will conduct its public hearing on the proposed amendments at the March 9th meeting. If the Commission votes to approve them on that date, Director Willever indicated that they would take effect in early April.

The next order of business was New Business proposed for future Commission agendas. Commissioner Heffner asked that the Staff present an overview of the 1992 Advisory Opinion to the Governor at the next meeting. In response to Commissioner Harsch, Chair Binder indicated that the Staff has been directed to provide some background information and preliminary language for the next meeting.

At 10: 27 a.m., upon motion made by Commissioner Heffner and duly

seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary